79-1148

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. No. ~~78-1631~~

SETH O. SPARKS,

Petitioner
~~Defendant-Appellant~~,

PETITION FOR A WRIT OF CERTIORARI

Charles F. Sandoval (R.E. Thompson, United States Attorney, with him on the brief) for Plaintiff-Appellee

Seth O. Sparks
Pro Se

INDEX

OPINIONS BELOW. 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED . . .3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 8

CONCLUSIONS 19

APPENDIX A (Opinion of the Court Appeals) 20

ACT OF CONGRESS. 5

CASE CITATIONS

CONSTITUTION OF THE UNITED STATES

Fourth Amendment 4,11,12

Fifth Amendment 3,13,14,15

Sixth Amendment . . . . . 3,13,14,15.

SUPREME COURT RULES 5

STATUES

18 U.S.C. 287 3,7

18 U.S.C. 495 4,7

18 U,S.C. 641 4,7

26 U.S.C. 7206(2)

28 U.S.C. 1254(1) 2

CASES

ACT OF CONGRESS 19

ALRIDGE V. U.S. 8,9,10
283 U.S. 309 (1931)
55 F.R.D. 229 13

HAM B. SOUTH CAROLINA 8
409 U.S. 524 (1973)

MIRANDA V. U.S. 14,15,16
384 U.S. 324 (1969)

OROZCO V. TEXAS 15
394 U.S. 343 (1969)

PEOPLE V. HARRELL 11
247 N.W. 2d 829 (1976)

RISTANIO V. ROSS 9,10, 11
424 U.S. 589 (1976)

RULE (19 B) 17,18

U.S. V. BELL 10
573 F. 2d 1040 (8thCir., 1978)

U.S. V. CARTER 10
44P F. 2d 1132 (6th Cir., 1971)

U. S. V. JOHNSON. 10
527 F.2d 1104 (4th Cir., 1975)

U.S. V. MARA 12,13
410. U.S. 19 (1972)

U.S. V. OLIVER 15
505 F.2d 301 (7th Cir., 1974)

U. S. V. ROBINSON 10
466 F.2d 780 (7th Cir., 1972

U.S. V. ROBINSON 10
485 F. 2d 1157 (3rd Cir., 1973)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1979

_____

No.

_____

Seth O. Sparks,

Petitioner,

vs.

The United States of America

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

The Petitioner, Seth O. Sparks, prays that a Writ of Certiorari issue to review the opinion and judgement of the Court of Appeals for the Tenth Circuit rendered in these proceedings on November 23, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pages 15 - 22, The opinion of the Dederal District Court for the District of New Mexico, is unreported.

JURISDICTION

The opinion of the Court of Appeals of the Tenth Circuit affirming the District Court judgment was entered on November 23, 1979 (Appendix A, infra, page 15). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Petitioner was a tax return preparer, who both prepared federal income tax returns and purchased, at a discount, the right to tax refunds. During an IRS agent stated to Petitioner, the IRS agent stated to Petitioner that he was investigating illegal aliens and further that Petitioner was under arrest. Subsequent to his arrest, Petitioner was forced to furnish handwriting exemplars to the Grand Jury. Later, at the time of trial, the Trial Court refused to ask certain voir dire questions relating to possible racial prejudice on the part of the prospective jurors, even though requested to do so by Petitioner's attorneys. The questions thereby arising are:

1. Whether the actions of the Internal Revenue Service Agent, in the course of his investigation, violated Petitioner's Constitutional rights against unreasonable searches and seizures, against self-incriminations and right to counsel.

2. Whether the requirement that Petitioner furnish handwriting exemplar to the Grand Jury violates against self-incrimination and further violates public policy concerning the Grand Jury.

3. Whether the Trial Court's refusal to propound voir dire questions relating to racial prejudice violated Petitioner's Constitutional right to be tried by a fair and impartial jury of his peers.

CONSTITUTIONAL PROVISIONS INVOLVED

I. CONSTITUTION OF THE UNITED STATES, AMENDMENT IV.

"The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...".

II. CONSTITUTIONAL FO THE UNITED STATES, AMENDMENT V.

"...nor shall (any person) be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...".

III. CONSTITUTION OF THE UNITED STATES, AMENDMENT VI.

"In all criminal prosecutions, the acused shall enjoy the right to a speedy and public trial, by an impartial jury... and to have the assistance of counsel for his defense."

IV. 18 U.S.C. 287

"Whoever makes or presents to any person or officer... of the United States, or to any department of agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent ...".

V. 18 U.S.C. 495

"Whoever falsely makes, alters, forges or counterfeits any...writing, for the purpose of retaining or receiving, or enabling any other person, to either directly or indirectly, obtain or receive from the United States... any sume of money; or whoever utters or publishes as true any such false, forged, altered or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited, shall be quilty under this section."

VI. 18 U.S.C. 641

"Whoever embezzles, steals, purloin or knowling converts to his own use...any records, vouchers, money, or thing of value of the United States; or whoever receives, conceals or retains the same with intent to convert it to use of gain, knowing it to be embezzled, stolen, prulonned or converted shall be quilty under this section."

STATEMENT OF FACTS

The Privacy Act of 1974 found in your federal income tax forms says:

The Privact Act of 1974 says that each federal agency that asks you for information must tell you:

A. Its legal right to ask for the information and whether the law says you must give it.

B. What a major purposes the agency has in asking for it, and how it will be used.

C. What could happen if the agency does not receive it.

Rule (19 B) of the Supreme Court:

B. Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an improtant question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decision of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power supervision.

STATEMENT OF FACTS

A. The Alleged Offenses:

The Petitioner was self-employed in Hobbs, New Mexico, as an income tax preparer. Petitioner, as a part of his business, was also a "discounter", and as such would buy an individual's right to his tax refund. This would allow the individual taxpayer to have cash immediately, and the party would not be required to wait for hos or her Government refund check. Petitioner would receive an oral assignment of the individual's right to his or her check and/or a written power of attorney, so that the Defendant could cash the refund check when received.

Petitioner began requiring written powers of attorney only after he had discussed procedure with an Internal Revenue Agent. He was informed at that time that the oral assignment of right was not sufficient, but his business and porcedures were acceptable to the IRS if he would acquire written powers of attorney.

B. Investigation of the Internal Revenue Service:

The Petitioner was contacted by a special agent of the Internal Revneue Service, who confiscated Petitioner's records incident to his tax preparer business. When taking Petitioner's records, the agent misled Petitioner as to his purpose in taking the records by stating that the

Agent was investigating illegal aliens. At no time was the Petitioner aware of the fact that his business operation or himself personally, was being investigated. The Petitioner was told of his right to have an attorney appointed for him by the Court if he could not afford one, and that he could confer with this attorney before any questioning.

C. Grand Jury Investigation:

The Petitioner was required by Order of Judge Edwin L. Mechem to furnish handwriting exemplars to the Grand Jury.

The Grand Jury then returned an indictment on April 5, 1978, which included 19 counts against the Petitioner, including three counts of forging U.S. Treasury checks, in violation of 18 U.S.C. 495; three counts of theft of Governmental property, in violation of 18 U.S.C. 495; three counts of theft of Govermental property, in violation of 18 U.S.C. 641; four counts of false claims, in violation of 18 U.S.C.287; nine counts of aiding and assisting in the preparation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206 (2)

D. Trial Proceedings:

Petitioner's attorneys requested certain voir dire questions to be asked by the Trial Court. These questions related to possible racial prejudice on the part of the prospective jurors. The Trial Court refused to ask these or any

questions relating to racial prejudice.

On June 1, 1978, the jury returned a verdict of guilty as to one count of forging a United States Treasury check, the true payee of which was Margaret Rogers, in violation of 18 U.S.C. 495, one count of theft of Government property incident to the return prepared for Margaret Rogers, in violation of 18 U.S.C. 641, and two counts of false claims incident to those returns prepared for Margaret Rogers and Roberto Hernandez, in violation of 18 U.S.C. 287. The jury returned a verdict of not guilty as to all other counts (the remaining fifteen counts) contained in the indictment.

It should be noted that Margaret Rogers and Roberto Hernandez are "non-black victims". It should be further noted that Petitioner was acquitted as to all counts dealing with "black victims." Also, Petitioner himself is black.

REASONS FOR GRANDING THE WRIT

1. The decision below conflicts with the Court's ruling in Ristaino vs. Ross, 424 U. S. 589 (1976), and the preceedings cases on which Ristaino is based.

This Court, in Alridge vs. U.S., 283 U.S. 308 (1931), and Ham vs. South Carolina, 409 U.S. 524 (1973), held that voir dire inquiry into possible racial prejudice was an issue of Constitutional stature.

> "The inquiry as to racial prejudice derives its Constitutional stature from the firmly established precedent of Alridge and the numerous state cases upon which it relies, and from a principal purpose as well as from the language of those who adopted the Fourteenth Amendment." Ham, Supra, at 528.

This Court's ruling in Ristaino, supra, somewhat limited the ruling in Ham, supra, and held that the need to question veniremen specifically about recial prejudice did not rise to Constitutional dimensions in every case. The Court held that the need was still of Constitutional stature in those cases were racial prejudice was likely, however.

This Court, in Ristaino, supra, did admonish, however, the Trial Court to inquire as to racial prejudice even in those cases where the need is not Constitutionally protected.

> "The wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the Defendant." Ristaino, supra, Footnote 9, page 597.

The Trial Court is this cause disregarded the Supreme Court's admonition, and further Petitioner's attorney at the Trial Court did request a number of questions relating to racial prejudice.

In an attempt to interpret the Supreme Court's holding in Ristaino, supra, the Eighth Circuit Court of Appeals Stated,

> "Of course a Federal Court does have a non-Constitutional duty to inquire as to possible racial bias on the jury panel when the Defendant is a member of a racial minority group. (Emphasis by the Court) U.S. vs. Bell 573 F.2d 1040, 1043 (8th Cir., 1978).

In fact, in Federal prosecutions following Alridge, supra, the Trial Judge has been required by the reviewing courts, when requested, to inquire regarding racial prejudice of the veniremen when the Defendant is black. U. S. vs. Robinson, 466 F.2d 780 (7th Cir., 1972); U.S. vs. Johnson, 527 F.2d 1104 (4th Cir., 1975); U.S. vs. Robinson, 485 F.2d 1157 (3rd Cir., 1973); U. S. vs. Carter, 440 F.2d 1132 (6th Cir., 1971).

The state courts have also attempted to follow the Supreme Court's holdings in Ristaino, supra, but have apparently had some difficulty in so doing. Justice Levin, in his dissenting opinion, in People v. Harrell, 247 N.W. 2d 829, 833 (1976), stated:

> "We would hope that where there are significant racial overtones, probing questions are necessary to enable a litigant to exercise intelligently his rights of

> chalenge and that the refusal to ask such questions is an abuse of the Judge's discretion to control voir dire examination."

Apparently, the Federal District Court of New Mexico, and the Court of Appeals for the Tenth Circuit disagree in their interpretation of Ristaino, supra, with the Courts cited above, in cases that the Trial Court has a duty to inquire as to whether the veniremen are racially prejudiced.

This Court should grant certiorari tothe Court of Appeals of the Tenth Circuit to insure uniformity between the lower courts with its decision in Ristaino, supra, and to clarify the Trial Court's duty in inquiring as to possible veniremen racial prejudice and the consequences of failing to do so.

2. The Prosecutorial Use of the Grand Jury Violates Petitioner's Constitutional Guarantees Against Self-Incrimination And is also against Public Policy, And Constitutional Policy concerning The Grand Jury:

The decisions of Judge Mechem, the Trial Court, and the Court of Appeals for the Tenth Circuit that the Grand Jury could require Petitioner to furnish handwriting exemplars required the finding that the Grand Jury is not subject to Constitutional limitations which protect the individual from

unreasonable searches and seizures and from self-incrimination. As Justice Douglas and Justice Marshall state in their dissenting opinion in U.S. vs. Mara, 410 U.S. 19 (1972) to accept that position is to breach the Constitution of the United States and over 200 years of American jurispudence.

Allowing the prosecutor and police, through the Grand Jury, to compel incriminating statements and obtain incriminating pieces of evidence as in the instant case, would

> "...serve only to encourage prosecutorial exploitation of the Grand Jury process, at the expense of both individual liberty and the traditional neutrality of the Grand Jury. Thus, if the Grand Jury may summon criminal suspects for such purposes without complying with the Fourth Amendment, it will obviously present an attractive investigative tool to prosecutor and police." Mara, supra, at 47 (Marshall dissenting).

Justice Douglas described the result of allowing the Grand Jury to breach Constitutional rights in his dissenting opinion, in Mara, supra, at page 29:

> "Are we to stand still and watch the prosecution evade its own Constitution restriction on its

> powers by turning the Grand Jury into its agent? Are we to allow the Government to usurp certain powers granted to the people by the Magna Carta and codified into our Constitution? That will be the result of the majority opinion unless we continue to apply to the Grand Jury the protection of the Fourth Amendment."

The Grand Jury has already become a tool for the prosecutor, as evidenced by Judge William Campbell's statement at 55 F.R.D. 229, 253 (1972).

> "This great institution (the Grand Jury) of the past has long ceased to be the guardian of the people for which prupose is created at Runnymede. Today it is but a convenient tool for the prosecutor..."

This Court's majority opinion in Mara,supara, allows the prosecution or the police to obtain incriminating evidence and to compel incriminating statements by the accused under the guise of the Grand Jury and insofar as it does so, invalidates the Fourth and Fifth Amendments of the Constitution of the United States.

3. Petitioner's Constitutional Rights as Guaranteed by the Fourth Fifth and Sixth Amendments to the United States Constitution Were Violated By the Government Agents In Their Investigation.

This Court, in Miranda v. Arizona, 384 U. S. 436 (1966) held that a Defend dants conviction must be reversed if it is based on testimonial evidence recieved from the acussed if the acussed's Constitutional rights were not explained to him prior to the confession.

This Court, in Miranda, supra, required that law enforcement agents explain to an accused that he has the right to remain silent, that anything the accused says can and will be used against him in a Court of law, and that the acussed has the right to consult with an attorney, either retained or appointed, prior to and during the interrogation.

The Court of Appeals for the Tenth Circuit, in its opinion, states that the Petitioner was not in custody at the time he was interrogated, so a "non-custodial Miranda warning" is all that is required. The "non-custodial Miranda warning" differs from the traditional Miranda warning only in that the acussed is not instructed that if he cannot afford an attorney, he has the right to an appointed attorney. What this differentiation means, in reality, is that a person who can afford an attorney can have a lawyer with him when he is being interrogated in a non-custodial situation, however, a poorer person, or an indigent who cannot afford an attorney is effectively precluded from being represented by an attorney under these circumstances. Thus, an indigent's Constitutional right to be represented by an attorney during questioning is conditioned on his wealth

and thus violated. This results in a complete disagreement with this Court's ruling in Miranda, supra, and the Fifth and Sixth Amendments to the Constitution of the United States in that preclaudes equal protection under the laws, and the conviction is not based on due process of law.

Further, the Court of Appeals for the Tenth Circuit misapplied this Court's ruling in Miranda, supra, in that they implied their decision would be different, with respect to the Miranda warning, if the Petitioner had been in custody at the time of the questioning. This Court held in Miranda, supra, at pages, 444, 445, 467, 477 and 478 that an accused's privilege against self-incrimination is imperiled and thus the warning must be given when one is "depriof his freedom of action in any significant way".

This Court also held in Orozco vs. Texas, 394 U.S. 324 (1969) that the warnings were required prior to interrogating a suspect in his own bedroom if it appears to the acused that he is not free to go where he pleases.

The Seventh Circuit, in its decision in U.S. v. Oliver, 505 F.2d 301, 304 (7th Cir., 1974), interpreted this Court's Miranda holding in even stronger terms stating:

> "The application of Miranda does not turn on such a simple axis as whether or not the suspect is in

custody when he is being questioned"

For the above reason, Miranda warnings were required to be given to the Petitioner before his interrogation, and only some of those warinins were actually given. Thus, the Petetioner's Constitutional rights as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, and this Court's holding in Miranda, supra, were breached in the investigation of the Petitioner.

RULE (19 B)

E. The charges are unreal the Petitioner stoll nothing from Rogers or Hernandez. The Petetioner processed W-2 forms that was sold to him by person believed to be the rightful owners

The Petitioner is one of many dis-discounters including the largest in the world - IRS, Master Charge Visa, American Express ect. That have unknowingly processed stolen or conterfiet instruments and the one that's quilty is seldom caught. Hundreds of millions are lost yearly.

A jury is the same as a computer. Dumb to all the facts of a case. All data is fed into to the computer. After they are programmed. It is the duty of the Court or operator to key the computer or jury on how to computer the program fed to them.

The court failed to give directions to the Jury if forgery was involved to choose the party unknown or the petitioner. It was clearly proved that the petitioner had no means to get the W-2 form to process but through Hernandez or Rogers of some one close to them that had access to their mail.

The petitioner all so operated a service station and had extensive dealing with discount instruments. He processed

thousands of government "credit cards", Visa, Master charge, all types of gas cards.

The card was honored not the person. The Petitioner saw thousand of travelers once in a life time and could not identify a single one six or eight months later, or even a day. A few stolen and revoked cards was received by the Petetioner but never was he as an agent of the company alerted or prosecutef for the forgery of a unknown.

Now why change and find the Petitioner of some unknown person gain?

The Petitioner pleads with the Supreme Court to rule him right or rule the government and all other discounters wrong for processing instrument assumed right.

EXPENMENT

Give one of your credit cards to one of your friends or your butler or yard boy. Send him to 5 or more places to buy with that card. Observe that the clerks don't look at the man they look only at the card. Come back 24 hours later and ask for a description of the one that used the card for the past experience, not one could give a description of the party, then decide who should get prosecuted.

Violation in the act of Congress(1974) He deceived the Petetioner stating that he was investigating aliens therefore violating the act of Congress.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgement and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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PRO SE

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. No. 78-1631

SETH O. SPARKS,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. Crim. No. 78-95)

Charles F. Sandoval (R.E. Thompson, United States Attorney, with him on the brief) for Plaintiff-Appellee.

Michael Danoff for Defendant-Appellant.

Bebore McWILLIAMS, BREITENSTEIN and LOGAN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

After a jury trial, defendant-appellant was found guilty of forgery of a United States Treasury check, 18 U.S.C. §495, theft of government property, 18 U.S.C. §641, and presentation of a false claim, 18 U.S.C. § 287. On this appeal he attacts the jury selection, refusal to supress statements by him to an IRS agent, admission of handwriting examplers, and the sufficiency of the evidence. We affirm.

Defendant was a tax return preparer who both prepared federal income tax returns and purchased at a discount the right to tax refunds. He carried on these activities in Hobbs, New Mexico. Three counts on which defendant was convicted related to Margaret Rogers. Rogers' W-2 Form was mailed by her employer to her Hobbs address. She had moved to Gallup, New Mexico, and did not receive it. At her request a new W-2 form was sent to her in Gallup. A tax consultant there prepared a return for her which she filed. She testified that she had never met defendant, and had not authorized him to sign a return for her or to receive her refund.

The other count related to Roberto Hernandez and presented facts similar to those pertaining to Rogers. Hernandez did not receive his W-2 form and his return was prepared by another consultant. He stated that he did not know defendant and had not authorized defendant to

to prepare a return for him.

Defendant says that the voir dire examination did not protect his rights adequately because of the failure of the court to ask requested questions relating to race. Defendant is black. The record does not clearly show the race of Rogers or Hernandez. Defendant did not object to the voir dire, and it may be that his claims come too late. See United States v. Vecchiarello, D. C. Cir., 536 F.2d 420, 423. In the circumstances presented, we consider the issue on its merits.

In Ristaino v. Ross, 424 U. S. 589, 596-598, the Court held that absent circumstances similar to those in Ham v. South Carolina, 409 U.S. 524, examination of prospective jurors with regard to racial prejudice is not constitutionally required. Defendant relies on a footnote in Ristaino, Id. at 597, N. 9, which comments on a nonconstitutional duty to propound appropriate questions relating to racial prejudice. In United States v. Polk, 10 Cor., 550 F.2d 1265, 1267, cert. denied 434 U.S. 838, we recognize Ristaino footnote 9 and pointed out that Ristaino involved a black defendant charged with a violent crime against a white man, whereas Polk was concerned with a nonviolent crime have no racial overtones. The same is true and the instant case. Viewed in its entirety the voir dire was fair to the defendant and well within the sound discretion of the trial court. Id. at 1267. Defendant's claim has no merit.

Over a six-month period an IRS Agent interviewed defendant several times. Defendant argues that statements made by him to the agent should have been

On his first visit the agent gave the defendant a noncustodial Miranda warning. This type of warning omits the advise that the person interrogated has the right to appointed counsel. Defendant relies on United States v. Dickerson, 7 Cir., 431 F.2d 1111, but that the case was specifically overruled by United States v. Fitzgerald, 7 Cir., 545 F. 2d 578, 581, because of the decision in Beckwith v. United States, 425 U.S. 341, 347, approving a noncustodial interrogation. See also United States v. Lewis, 6 Cir., 556 F.2d 446, 448-449, cert. denied 434 U.S. 863. Although defendant says that the agent told him that he was not in custody. He was not handcuffed ant at least four interviews took place over the six-month period with the defendant and the agent making at least one trip in seperate cars.

Defendant argues that the agent obtained statements and documents by guile and deceit. We have recognized that Fourth Amendment protections can be violated "by guile as well as by force." United States v. Oakes, 10 Cir., 564 F.2d 384, 386, cert. denied 435 U.S. 926. Defendant testified that the agent told him that he, the agent was investigating "illegal aliens." The agent testified that he told defendant that he was investigating possible criminal violations of the tax laws. Defendant did not deny this statement of the agent. The record fails to show affirmative misrepresentations by the agent. See United States v. Prudden, 5 Cir., 424 F.2d 1021, 1033, cert. denied 400 U.S. 831. Defendant's

statements were made, and the documents surrendered, voluntarily and without duress and coercion. They were properly received. Schneckloth v. Bustamonte, 412 U.S. 218, 248-249. See also United States v. Shields, 10 Cir., 573 F.2d 18, 22-23.

Defendant urges the court erred in requiring him to furnish handwriting exemplars. The decision are against him. Gilbert v. California, 388 U.S. 263, 266-267, holds that the furnishing of such an exemplar does not violate the Fifth Amendment privilege against self-incrimination, and United States v. Mara, 410 U.S. 19, 21-22, holds that such action does not violate the Fourth Amendment We followed Mara in United States v. Blakney, 10 Cir., 581 F.2d 1389, 1390. Defendant emphashzes the dissent of Justice Marshall in Mara, 410 U.S. at 31, and asks us to reconsider Blakney. We decline to do so. The court properly required defendant to furnish the handwriting exemplars.

At the conclusion of the government's case defendant moved to dismiss the indicment because of the lack of proof of the required specific intent. We consider the motion as one for the judgement of acquittal. After the court denied the motion, the defense presented evidence including the testimony of the defendant. The government contends that the defense failure to renew the motion at the close of all evidence amounts to a waiver and precludes consideration of evidence sufficiency at this time. In United States v. Lopez, 10 Cir., 576 F.2d 840, 842-843, we recognized the waiver or preclusion rule and noted that it had been criticized and attacked. No necessity for consideration of the rule exists in the case at bar beacuse we are convinced that substantial

evidence sustains the verdict. An appllate court does not weigh conflicting evidence or pass on the credibility of witness. United States v. Waltson, 10 Cir., 552 F.2d 1354, 1366, cert. denied 431 U.S. 959. We review the evidence in the light most favorable to the government to ascertain whether the evidence, with reasonable inferences therefrom, suffices to sustain the verdict. United States v. McMahon, 10 Cir., 562 F.2d 1192, 1195.

Rogers testified that she had never met defendant, that her tax return was prepared by another, and that she did not authorize defendant to sign her refund check. Hernandez testified that another person prepared his return, that he gave no one permission to sign his return, and that he did not sell his W-2 form to defendant. Other evidence connected defendant with the returns. Defendant's testimony was contrary to the government's evidence. The decisive question on the counts relating to Rogers and Hernandez was credibility and the jury resolved that question against defendant. The evidence suffices to sustain the verdict.

Affirmed.